

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34709

STATE OF IDAHO,)	2009 Unpublished Opinion No. 458
)	
Plaintiff-Respondent,)	Filed: May 8, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
KENNETH BERGER,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. G. Richard Bevan, District Judge.

Order of the district court denying motion to suppress, affirmed.

Molly J. Huskey, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Kenneth Berger entered a conditional plea of guilty to a charge of driving under the influence, Idaho Code § 18-8004, 18-8005(7). He appeals, contending that the district court erred in denying his motion to suppress. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

While working as a patrol deputy in Jackpot, Nevada, Elko County Deputy Sheriff Sean Munson pulled into the local Chevron gas station to purchase fuel. Before he could stop at the gas pump, the attendant, with whom the deputy was familiar, ran up to his car to report an intoxicated driver. The attendant told the deputy that a man whom the attendant felt was intoxicated had stopped to purchase fuel. The attendant reported that the man smelled of alcohol, had bloodshot eyes, appeared confused and that his mannerisms suggested that he was

intoxicated. Deputy Munson was told that the man was driving a silver or grey van with Idaho license plates and had left the gas station just moments before Deputy Munson had arrived.

Deputy Munson drove from the gas station, located approximately one-quarter mile from the Idaho border, north on Highway 93. Approximately one mile inside the Idaho border, Deputy Munson observed the silver van travelling at approximately 75 miles per hour in a 65 mile per hour zone and observed the van cross the fog line multiple times. Berger was stopped by Deputy Munson approximately three miles inside the Idaho border. Deputy Munson smelled alcohol and observed Berger's bloodshot eyes. Berger failed the horizontal gaze nystagmus test and Deputy Munson contacted the Idaho State Police. Trooper Bingham, of the Idaho State Police, arrived and, after Berger failed additional field sobriety tests, arrested Berger for driving under the influence.

Berger filed a motion to suppress claiming that Deputy Munson was without authority to stop him in Idaho. The district court denied the motion. Berger then entered a conditional plea of guilty to felony driving under the influence, preserving his right to appeal the denial of his motion to suppress. The district court sentenced Berger to a unified term of six years with two years determinate, suspended the sentence, and placed Berger on three years probation with one hundred and twenty days in jail. This appeal followed.

II. ANALYSIS

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, we accept the trial court's findings of fact that are supported by substantial evidence, but we freely review the application of constitutional principles to the facts as found. *State v. Atkinson*, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995); *State v. Schevers*, 132 Idaho 786, 789, 979 P.2d 659, 662 (Ct. App. 1999).

Berger contends that while an officer of another state has authority to enter Idaho in "fresh pursuit," Deputy Munson was outside of his authority when he stopped Berger in Idaho. As such, Berger claims that all evidence obtained as a result of the stop should have been

suppressed. Idaho Code § 19-701 outlines the authority granted by Idaho to an officer of another state entering Idaho in fresh pursuit:

Any member of a duly organized state, county, or municipal peace unit of another state of the United States who enters this state in fresh pursuit and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state.

Idaho Code § 19-705 defines fresh pursuit:

The term "fresh pursuit" as used in this act shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

On this appeal, Berger's argument centers around the definition of fresh pursuit in I.C. § 19-705. Berger claims that "a plain reading of the statute shows that fresh pursuant (sic) is defined by common law and 'the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony,' even if no felony has been committed" (emphasis added). Thus, in order to find that the officer was in fresh pursuit, Berger contends that there must be facts satisfying a common law definition or elements of fresh pursuit and the pursuit be of a person who has committed a felony or who is reasonably suspected of having committed a felony, even if no felony has been committed. While Berger does not expressly assert prima facie elements of fresh pursuit, he cites to five criteria which he contends must be considered "[w]hen analyzing the fresh pursuit doctrine under the common law," as follows:

- (1) that a felony occurred in the jurisdiction;
- (2) that the individual sought must be attempting to escape to avoid arrest or at least know he is being pursued;
- (3) that the police pursue without unnecessary delay;
- (4) that the pursuit must be continuous and uninterrupted, though there need not be continuous surveillance of the suspect nor uninterrupted knowledge of his location, and

(5) that there be a relationship in time between the commission of the offense, commencement of the pursuit, and apprehension of the suspect.¹

Berger argues: “Thus, there was no evidence that Mr. Berger was attempting to escape to avoid arrest or even knew he was being pursued. Likewise, there is not evidence that the pursuit was continuous and uninterrupted because Deputy Munson did not initiate pursuit until Mr. Berger was already in Idaho, and never personally observed Mr. Berger break a single traffic infraction or law in the State of Nevada.”

The State argues that fresh pursuit exists, pursuant to I.C. § 19-705, irrespective of any common law principles, if “the pursuit [is] of a person who has committed a felony or who is reasonably suspected of having committed a felony.” The State points out, and Berger concedes, that for purposes of arrest, driving under the influence is treated as a felony. I.C. § 49-1405(1)(b); *State v. Griffiths*, 113 Idaho 364, 744 P.2d 92 (1987). Thus, the State argues that the district court correctly found that Deputy Munson reasonably suspected Berger of having committed a felony.

Although the State has not argued a procedural bar, we note that Berger’s contentions on appeal were not raised below. While Berger claimed below that Deputy Munson was not in fresh pursuit, the argument was entirely based upon the assertions that Deputy Munson did not have probable cause, to the extent probable cause is required, or that Deputy Munson did not have a reasonable suspicion that Berger had committed a felony in Nevada. Berger did not argue below that the State was required to prove or that there was a lack of evidence to demonstrate that Berger was attempting to escape to avoid arrest or that he was unaware that he was being pursued or that there was a lack of evidence that the pursuit was continuous and uninterrupted. No evidence was or could have been presented at the suppression hearing on these issues because they were never raised. It is disingenuous for Berger to now argue that the evidence was

¹ Berger cites, as authority for these elements, *City of Wenatchee v. Durham*, 718 P.2d 819, 821-822 (Wash. Ct. App. 1986). *City of Wenatchee* has been distinguished by Washington courts and ultimately superseded by statute. See *State v. Barron*, 160 P.3d 1077, 1079 (Wash. Ct. App. 2007) (noting that *City of Wenatchee* has been superseded by statute); *Vance v. State, Dept. of Licensing*, 65 P.3d 668, 670 (Wash. Ct. App. 2003) (noting that *City of Wenatchee* was issued before applicable statute took effect and declining to be limited by the common law definition of fresh pursuit); *City of Tacoma v. Durham*, 978 P.2d 514, 516 (Wash. Ct. App. 1999).

lacking. Issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992).

Moreover, in *State v. Ruhter*, 107 Idaho 282, 283-84, 688 P.2d 1187, 1188-89 (1984), the court held that the Nevada officer had reasonable cause to believe that Ruhter was driving under the influence and, since driving under the influence is considered a felony for purposes of arrest in both Idaho and Nevada, the Nevada police officer's pursuit and detention of Ruhter in Idaho was lawful under the fresh pursuit doctrine as set forth in I.C. § 19-701.² The district court correctly determined that Deputy Munson reasonably suspected Berger of having committed a felony and was, thus, in fresh pursuit at the time he stopped Berger in Idaho.³ His pursuit into Idaho was taken without unreasonable delay.⁴

III.

CONCLUSION

The asserted common law elements of fresh pursuit were not raised below and will not be addressed further. Deputy Munson was in fresh pursuit of Berger under Idaho statutory and case law when he crossed into Idaho and, therefore, the stop and seizure of Berger was within his authority and legal. The district court's order denying Berger's motion to suppress is affirmed.

Judge PERRY and Judge GUTIERREZ, **CONCUR.**

² Berger addressed *Ruhter* in the district court only relative to the question of whether probable cause was required by the statute or present in that case. However, on appeal, Berger cites to *Ruhter* for the proposition that the Idaho courts have failed to provide "further delineation" to the term "fresh pursuit."

³ On this appeal, Berger neither argues, as he did below, that probable cause is required under the statute nor that Deputy Munson was without sufficient facts to support a reasonable suspicion that Berger had committed a felony.

⁴ Since we hold that Deputy Munson did not act outside authority of law, we need not address Berger's assertion under Article I, Section 17 of the Idaho Constitution.